SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
E. ROBERT SEAVER, CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1971

NO. 71-1046

JOHN IKE GRIFFITH
Petitioner

vs.

ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John Ike Griffith, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on the 5th day of October, 1971, which judgment affirmed the conviction of JOHN IKE GRIFFITH for the misdemeanor of "practicing law without a license" in the Circuit Court of Jefferson County, Alabama.

A timely application for rehearing in the Court of Criminal Appeals of Alabama was denied, without opinion, on the 2nd of November, 1971.

A timely application for a writ of certiorari was filed in the Supreme Court of Alabama and denied, without opinion, on the 24th day of November, 1971.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Alabama has been reported at 255 So2d 403, *cert. den.* 255 So2d 52. and is attached hereto in Appendix A, *infra*, pp. A1 thru A6.

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 5th day of October, 1971, and is annexed hereto in Appendix A, *infra*, p. A7.

A timely petition for rehearing was denied on the 2nd of November, 1971, and the judgment of the Court of Criminal Appeal of Alabama thereon is in Appendix A, *infra*, p. A8.

A petition for writ of certiorari timely filed in the Supreme Court of Alabama was denied on the 24th day of November, 1971, and the order thereon is in Appendix A, *infra*, p. A9.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered the 5th of October, 1971, is 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether or not Alabama denied to petitioner JOHN IKE GRIFFITH the right to due process in his criminal trial for a misdemeanor, such right being guaranteed by the Fourteenth Amendment, United States Constitution, where the trial judge when confronted with a headline newspaper article circulated at the venue of the trial did not poll the jury to determine if, in fact, one or more of them had read that article, and, if so, the extent of any prejudicial influence.

II.

A subsidiary and necessarily included question is what federal standards or requirements are imposed upon a state court to insure a fair trial where there has been newspaper publicity prejudicial on its face during the progress of the trial, such publicity being accessible to the jury.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

I.

Constitution of the United States, Amendment XIV, Section 1:

Section 1. ***nor shall any state deprive any person of life, liberty, or property, without due process of law ***

II.

Title 28, Section 1257(3), United States Code:

Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, ***where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, ***the United States.

STATEMENT OF THE CASE

Petitioner GRIFFITH was proceeded against in the Circuit Court of Jefferson County, Alabama, for an alleged violation of the Alabama statute prohibiting the practice of law without a license.

The salient and pertinent facts adduced to support the indictment are delineated in the opinion of the Court of Criminal Appeals of Alabama, and, in the interest of conserving time and space, shall not be repeated at this point. The attention of the Court is respectfully invited to Appendix A, *infra*, pp. A1 through A6, since this opinion fairly presents the basic factors involved in the trial.

Of particular import here, however, and especially in connection with the questions for which review is sought, the proceedings concerning the newspaper publicity must be presented at a greater length. (1)

After an overnight recess, during which the jury were separated, the Court reconvened on the 17th of March, 1970, at which time, out of the presence of the jury, the following transpired:

> "MR. WRIGHT: The defendant will make a motion at this time for a mistrial in this case based upon this article that appeared this morning in this morning's Post Herald recounting yesterday's proceedings in the case. It is highly inflammatory and prejudicial against the defendant. It misstated the nature of the case entirely. It is discussing matters that were taken up in court outside the presence of the jury and the defense feels that it is so prejudicial the defendant could not receive a fair and impartial trial by jury.
>
> "I think Your Honor knows what importance the jury attaches to Your Honor's opinion about a certain matter in the case, and from this they would know you have already overruled my contention about that part of the case; we have precluded any argument, any affirmative argument, on my part, about the matter.
>
> "MR. McDONALD: Judge, of course, – there are a line of cases, Your Honor, that state this, or this in

(1) The article in question is reproduced at the end of this petition.

substance; that even – – and we say even if – – any or all of the jurors had read any publicity concerning the case that that within itself does not mean that the particular jury cannot divorce themselves from what they have read and give both the State and the defendant a fair and impartial trial. That is all that we care to be heard on, with the exception that, Your Honor – – I don't know what your thinking is, but he may want to discuss this with the jury as a body – – but even if some have read it, to say that they could not follow their oath in fact and try the case on the facts as presented really puts, I think, a stigma on our population that shouldn't be there – – I mean the total of it. Of course, the argument that he means – – he said that he wouldn't be able to argue – – I really don't understand that part, unless he meant that he couldn't argue that the evidence should have been excluded.

"That's all we have, Your Honor.

"MR. WRIGHT: Your Honor, I would say in reply to that on these points we are making, not that any publicity about the trial calls for a mistrial, but that the circumstances of this article is what should be the determining factor – – the heading of this article – – woman testifies in bogus divorce case – – there is no evidence it is bogus divorce, it is not even about a divorce. That is not what the defendant is charged with in this case. There is a discussion in this article about a matter taken up outside the presence of the jury concerning a statement in a context I never made and Your Honor has already ruled on. It is certainly prejudicial to the jury and something the jury could not divorce itself from it.

"THE COURT: Anything further, gentlemen?

"MR. McDONALD: The State has nothing.

"MR. WRIGHT: No, sir.

"THE COURT: I'll overrule the motion for a mistrial.

"MR. WRIGHT: We except." (Record pp. 108 thru 110)

An argument based on the apparent philosophy underlying *Sheppard v. Maxwell*, 384 US 333, was developed for the Court of Criminal Appeals, and this argument was rejected in the opinion of the Court:

> "When court reconvened the morning of March 17, 1970, defense counsel moved for a mistrial based upon an article appearing in the morning's Birmingham Post Herald. It was alleged that said article recounted the previous day's proceedings and discussed a matter gone into outside the presence of the jury.
>
> "There is no showing that the newspaper article was produced, nor was there any evidence presented to support the motion. We are not prepared to hold that the trial court erred in its ruling denying a mistrial."

It is submitted the federal constitutional question was raised at the first opportunity in the trial court; the issue was briefed on appeal; and the matter was adjudicated adversely to the petitioner GRIFFITH. There is a properly presented federal constitutional issue before this Court.

REASONS FOR GRANTING THE WRIT

The right of a defendant in a criminal case to enjoy a trial before a jury as impartial as possible, and one not subjected to the influence of newspaper articles, etc., has been broadly outlined by this Court in *Sheppard v. Maxwell*, 384 US 333.

What has not been decided definitely are the procedural steps incumbent upon a state trial court to insure an impartial

jury where that state trial court has been notified of the publication of a newspaper article containing prejudicial matter, which newspaper would have been available to the members of the jury as they went about their separate ways overnight.

This trial judge was also aware of the tremendous publicity which had been generated over a period of time in Birmingham, Alabama, and even other parts of the United States concerning "quickie divorces", and this prosecution rested, in fact, on the practice of law in obtaining such a divorce.

It is in this context of repetitive publicity that the article in question must be examined for possible prejudice.

On analysis, two issues appear: (1) Was the article actually prejudicial?, and (2) What procedural steps are mandatory on a state court trial judge in a criminal case to insure the jury remain untainted?

The trial judge here made no finding for the record that the article in question was not prejudicial on its face. The statements of defense counsel, uncontradicted by Alabama, were to the effect that the article was prejudicial. In this state of the record, it is submitted the conclusion must be reached that the article headlined in the BIRMINGHAM POST-HERALD was, in fact, prejudicial.

The Court of Criminal Appeals in its opinion stressed in denying the contentions of petitioner GRIFFITH that "there was no showing the newspaper article was produced,***" In the Application for Rehearing filed in the Court of Criminal Appeals of Alabama, petitioner GRIFFITH stated:

> "It is submitted that a careful reading of the Record, pp. 108 thru 110, demonstrates that everyone in attendance at this out-of-the-presence-of-the-jury discussion was well aware of the contents of the article in question. Mr. Wright, defense counsel, stated the headline – 'Woman Testifies in Bogus Divorce Case'

– and further capsuled the contents of the article in question. The State did not deny this presentation."

The opinion of the Court of Criminal Appeals is a legalistic approach to a trial problem, and does not discuss the realities of trial practice. Where the trial judge is shown by the record to have been cognizant of the matter before him (and he undoubtedly read the article in question) then avoidance of the impartial jury issue by such a reliance on a technicality approaches in and of itself a denial of due process.

Accepting the conclusion the article was on its face of a nature calculated to be prejudicial, the second question assumes import of more consequence to the rights of a defendant.

How, consistent with that due process guaranteed by the Fourteenth Amendment, United States Constitution, does a state trial judge ascertain the continued existence of an impartial jury?

Careful research has failed to disclose any case which is determinative of the issue. Trial experience, particularly in the federal courts, indicates an acceptable, constitutional practice of minimal standards.

In federal criminal practice in the Northern District of Alabama the routine has been somewhat like the following: (1) The article in question is called to the attention of the trial judge; (2) If there is a *possibility* of prejudicial material to which the jury might have had access during a recess, then, (3) The federal district court judge asks of the jury if any one of them has read the article in question; (4) If so, then the questioning proceeds about any influence on that juror's deliberations.

The foregoing are practical safeguards, and the following of such a procedure would not burden the trial court, nor delay unduly the progress of the trial. At the same time, the defendant would have as much assurance as is possible that the jury that is trying him is impartial.

The absence of any federal constitutional standards to be followed by state trial courts, and even federal courts, is a hiatus in criminal trial practice. In this era of rapid and persistent dissemination of material from the communications media, the problem of possible prejudice assumes a more urgent status than in more leisurely days.

It is submitted that a definitive pronouncement by this Court in this area of procedural due process would result in a decrease in appeals on this issue, with a resulting saving in time for all concerned.

CONCLUSION

The questions presented are deemed ones which have not been considered by this Court.

Petitioner GRIFFITH submits because the questions do involve a highly important, though narrow, facet of the Fourteenth Amendment, and one applicable to numerous trials, this Court should issue the writ of certiorari so that these questions may be fully briefed, argued, and decided.

Respectfully submitted,

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February, 1972

Attorney for Petitioner

Woman testifies in bogus divorce case

BY JANE ALDRIDGE

A mini-skirted young woman from the New York Bronx testified in Circuit Court Monday concerning negotiations last year with a disbarred Birmingham lawyer to obtain a $460 quickie divorce she said she now understands is illegal.

Testifying before Circuit Judge Joseph Jasper at the trial of John Ike Griffith, charged with practicing law without a license, Mrs. Antoinette Calabis said she had not known until after she arrived in Birmingham last August that Griffith, who indicated he was an attorney in correspondence with her, had been disbarred two years earlier.

She discovered his status, she said, when she failed to find his name listed with other attorneys in the yellow pages of the phone directory and made inquiry of the Birmingham Bar Association.

She agreed, she said, at the request of Drew Redden, then president of the Birmingham Bar Association, and Roy W. Show, chairman of its Unauthorized Practice of Law Committee, to go ahead with negotiations with Griffith.

That same day, Aug. 8, she said, she went to Griffith's office at the Central Bank Building and talked with him in his private office for about 30 minutes during which she said he assured her of the validity of Alabama divorces and gave her photocopies of newspaper stories and other documents to show their legality.

She said she signed various documents relating to the divorce, but balked at paying him the requested $460 until she had "the decree" in hand.

When she returned to his office the following Monday, she said, she did not see him, but received from his secretary a signed official looking document with a gold seal purporting to be her final decree from the St. Clair County Circuit Court. She said she handed over the $460 payment.

Attorneys Redden and School then took the witness stand to describe searches made of court records at Asheville and Pell City in St. Clair County where the only cases bearing the number 813, supposedly the number of the divorce, were a 1946 case at Ashville and a '57 case at Pell City. They said they found no docket sheet, no index record, no court case in the name of Antoinette and Nicholas R. Calabis.

Reimbursed

She was reimbursed for the $460, Scholl said, by the local bar association because "We wanted to find out how he was operating."

"Have you remarried?" was the final question of the prosecutor, Deputy Dist. Atty. Russell T. McDonald, as he concluded the state's case. "No," she said, "I am not divorced as I understand it."

Defense Atty. Steve Wright, in a motion made outside the presence of the jury, then called on Judge Jasper for a directed verdict for the defense declaring the bar association officials had attempted to entrap Griffith. Judge Jasper overruled the motion and also motions to exclude the evidence.

The defense is scheduled to start putting on testimony for Griffith when court reconvenes at 9:30 a.m.

OCTOBER 5, 1971
THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1971–72

6 Div. 146

John Ike Griffith

v.

State

Appeal from Jefferson Circuit Court

PRICE, PRESIDING JUDGE

The indictment in this case reads:

"The grand jury of said county charge that, before the finding of this indictment, John Ike Griffith unlawfully did assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer subsequent to his disbarment, against the peace and dignity of the State of Alabama."

Upon conviction the jury assessed a fine of five hundred dollars and the court imposed a sentence at hard labor for Jefferson County as additional punishment.

For present failure to pay the fine and costs or to confess judgment therefor, under § 341, Title 15, Code, the court added 140 days at hard labor to pay the fine and 16 days to pay costs.

§ 31, Title 46, Code of Alabama 1940, provides:

> "If any person shall, without having become duly licensed to practice, or whose license shall have expired either by disbarment, failure to pay his license fee within thirty days after the day it becomes due, or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of a misdemeanor and fined not to exceed five hundred dollars, or be imprisoned for a period not to exceed six months or both."

Where the offense is statutory it is sufficient to allege it in the words of the statute, provided it sufficiently defines the crime.

The indictment, not challenged by demurrer or otherwise, is substantially in the words of the statute. The allegation that defendant's conduct occurred subsequent to his disbarment, instead of subsequent to the expiration of his license by disbarment, did not render the indictment void.

§ 327 of Title 15, Code, provides that where a misdemeanor has been committed, the punishment for which is not particularly specified in the code, sentence may be imposed at hard labor for the county or imprisonment in the county jail, for not more than six months.

Defendant contends it is clear from the hard labor sentence imposed that the proceedings were had under § 42, Title 14, Code, which provides for punishment under said § 327, Title 15, Code, rather than under § 31 of said Title 15, which particularly specifies imprisonment. We do not agree with this contention. The sentence to hard labor is improper, requiring remandment for proper sentence.

Appellant argues that the addition of hard labor sentence to pay the fine and costs violates the equal protection clause of the Fourteenth Amendment of the United States' Constitution, relying on *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L Ed 2d 586. *Williams v. Illinois*, supra, clearly applies to indigent defendants. There is no proof in this case that this appellant is indigent.

The state's testimony tends to show that John Ike Griffith was disbarred in July of 1967; that he was not licensed to practice law in Alabama in July and August, 1969, nor had he been licensed to practice law any time from July 1, 1967, to date of trial.

Mrs. Antoinette Calavas, a resident of Brooklyn, New York, had some correspondence with John Ike Griffith in June and August, 1969, concerning an Alabama divorce from her husband, Nicholas R. Calavas. Some letters, over the signature of defendant, containing details about the prospective divorce, were introduced in evidence.

Mrs. Calavas came to Birmingham on August 7, 1969, and went to defendant's office in the Central Bank Building, Birmingham, on August 8th. In her best judgment defendant's name with "Attorney at Law," was on the door. She was given a paper to read by a secretary in the outer office. This paper, a document outlining the processing of a divorce case, was introduced into evidence. She saw the defendant in an inner-office where he marked certain papers, put them in an envelope and gave them to her. These exhibits pertained to Alabama divorce decrees. One exhibit was a receipt from defendant for $465.00 to Mrs. Calavas for a divorce. Mrs. Calavas stated that she was asked to sign and did sign a statement that she personally petitioned the court for a divorce. She did not give the defendant the $465.00, at that time, saying she did not want to leave the money with him until she had the decree. She was informed either by John Ike Griffith or the secretary in his presence, that she could have the decree Monday, at which time she could make full payment and leave with the decree in her hand. She

returned to defendant's office Monday, August 11th. She did not see John Ike Griffith on that occasion, but talked to the young lady in the outer office, who was the same person she talked to there previously. Mrs. Calavas gave this person $465.00 and received two pieces of paper with gold seals on them. Exhibits 23 and 24 were introduced into evidence. Exhibit 23 is a divorce decree in the case of *Antoinette Calavas v. Nicholas R. Calavas*, in the Circuit Court, in Equity, St. Clair County, Alabama. Exhibit 24 is a duplicate decree.

Mrs. Calavas further testified the Birmingham Bar Association returned to her half the amount paid to defendant and returned the other half to Nicholas Calavas.

On cross examination Mrs. Calavas testified she first met Mr. Roy W. Scholl, Jr., (identified as Chairman of the Unauthorized Practice of Law Committee of the Alabama Bar Association) the Friday she came to Birmingham. She was unable to locate Mr. Griffith in the yellow pages and placed a call to the Birmingham Bar Association. Upon being informed that Mr. Griffith had been disbarred a call was placed to Mr. Drew Redden (President of the Birmingham Bar). Mr. Scholl was called after she arrived at Mr. Redden's office. This was before she went to Mr. Griffith's office. Mr. Redden or Mr. Scholl requested that she go ahead with the meeting with Mr. Griffith. After she saw Mr. Griffith she spoke again with Mr. Scholl. He told her that the Bar Association had had a meeting and they were willing to reimburse her for the amount of the divorce decree if she would put up the money she had with her to pay for it.

Defendant's exhibit "A," a divorce bill of complaint was signed "Antoinette Calavas," and was not signed by anyone as "Solicitor for Complainant." It is marked "Filed Aug. 8, 1969, St. Clair County, /s/ Ann W. Love, Register."

Defendant's exhibit "B," Deposition of Antoinette Calavas taken before Commissioner on Interrogatories, was signed by Antoinette Calavas, and certified by S.M. Bowman, as Commissioner. It was stipulated by the state and defendant that S. M. Bowman was a secretary in defendant's office.

At the close of the state's testimony in chief defendant moved that the state's evidence be excluded on the ground that it failed to make out a prima facie case against defendant, and moved for a directed verdict on the ground the state's evidence clearly shows a case of entrapment, planned and executed by the Alabama State Bar or the Birmingham Bar Association. The motions were overruled.

Upon consideration of the evidence we find it sufficient to make out a prima facie case against the defendant. The motion to exclude was properly overruled.

"Entrapment" is the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting criminal prosecution against him." *State ex rel Taylor v. Devore* (W. Va.) 58 S. E. 2d 641; Words and Phrases, Permanent Edition, Vol. 14A. See also *Johnson v. State*, 36 Ala. App. 634 61 So. 2d 867, where the court quoted approvingly from 22 C.J.S. Criminal Law, § 45 p 100, as follows:

> "***(A) distinction has been drawn between the inducing of an innocent person to do an unlawful act, and the setting of a trap to catch one in the execution of a criminal plan of his own conception, an act of the latter character by an officer not being regarded as against public policy,***."

The undisputed evidence in this case is that Mrs. Calavas made a trip to Birmingham after receiving letters from defendant agreeing to represent her in a divorce action. It was after her arrival, when she was unable to find him listed as a practicing lawyer, that she contacted the Bar Association and arrangements were made for her to go through with the divorce action as planned. The circumstances do not show an entrapment. The motion for a directed verdict was properly overruled.

When court reconvened the morning of March 17, 1970, defense counsel moved for a mistrial based upon an article appearing in the morning's Birmingham Post Herald. It was alleged that said article recounted the previous day's proceedings and discussed a matter gone into outside the presence of the jury.

There is no showing that the newspaper article was produced, nor was there any evidence presented to support the motion. We are not prepared to hold that the trial court erred in its ruling denying a mistrial.

The defendant took the stand and testified in his own behalf. After reciting his educational and teaching background, he stated he was licensed to practice law in Alabama in 1938, and practiced for about thirty years before disbarment proceedings were instituted against him. The Bar Association entered a resolution of disbarment, which was appealed to the Supreme Court of Alabama, and affirmed by that court. An appeal to the United State's Supreme Court was pending during the month of August, 1969, but that court did not hear the petition. The defendant refused to answer any question, or to testify about any exhibits, concerning his alleged representation of Mrs. Calavas, of the ground his anwer might tend to incriminate him.

In our opinion the evidence is sufficient to sustain the judgment of conviction. The motion for a new trial was properly overruled.

The fact that an appeal was pending in the Supreme Court of the United States at the time of the alleged activities did not entitle defendant to practice law pending such appeal. *Ex parte Alabama State Bar*, 285 Ala. 191, 230 So. 2d 519.

The judgment is affirmed. The cause is remanded for proper sentence.

Affirmed, but remanded for proper sentence.

OCTOBER 5, 1971

STATE OF ALABAMA - - - - - - - JUDICIAL DEPARTMENT

COURT OF CRIMINAL APPEALS OF ALABAMA

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: PRESIDING JUDGE ANNIE LOLA PRICE AND AUBREY M. CATES AND RENEAU P. ALMON, ASSOCIATE JUDGES

6th Div. 146

John Ike Griffith
vs.
State of Alabama

Appeal from Jefferson Circuit Court

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is further considered that the cause be remanded to the Circuit Court for the entering of the proper sentence.

It is also considered that the appellant and sureties on the appeal pay the costs of appeal in this Court and in the Circuit Court.

NOVEMBER 2, 1971

STATE OF ALABAMA - - - - - - - JUDICIAL DEPARTMENT

COURT OF CRIMINAL APPEALS OF ALABAMA

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: PRESIDING JUDGE ANNIE LOLA PRICE
AND AUBREY M. CATES AND RENEAU P. ALMON,
ASSOCIATE JUDGES

6th Div. 146

John Ike Griffith

vs.

State of Alabama

Appeal from Jefferson Circuit Court

IT IS ORDERED that the application for rehearing be and the same is hereby overruled.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1971–72

NOVEMBER 24, 1971

6th Division 926

Ex parte: John Ike Griffith, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: John Ike Griffith v. State of Alabama)

Jefferson Circuit Court

Come the Petitioner and the Petition for Writ of Certiorari to the Court of Criminal Appeals being submitted and duly examined and understood by the Court, it is considered and ordered that the Petition for Writ of Certiorari to the Court of Criminal Appeals be, and the same is hereby, denied, and the petition be, and the same is hereby dismissed at the cost of the petitioner, for which cost let execution issue.

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In The

Supreme Court of the United States

OCTOBER TERM 1971

NO. 1046 71-1046

JOHN IKE GRIFFITH,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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In The

Supreme Court of the United States

OCTOBER TERM 1971

NO. 1046

JOHN IKE GRIFFITH,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

John Ike Griffith v. State of Alabama, 255 So. 2d 48, October 5, 1971, rehearing denied November 2, 1971 (A. pp. 1-8).

Certiorari was denied by the Supreme Court of Alabama on November 24, 1971. 255 So. 2d 52 (A. p. 9).

II

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of

Criminal Appeals of Alabama rendered on October 5, 1971, rehearing denied on November 2, 1971. A petition to the Supreme Court of Alabama for a writ of certiorari was denied on November 24, 1971.

Petitioner applies for this writ of certiorari under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTION PRESENTED

Whether the denial of motion for mistrial will support the Supreme Court's jurisdiction when such denial is based upon State law and rules of practice.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Jefferson County, Alabama, of unlawfully holding himself out as a qualified attorney and he appealed.

During the trial, when the Court reconvened on March 17, 1970, defense counsel moved for a mistrial based upon an article appearing in the Birmingham Post Herald. While it was alleged that said article recounted the previous day's proceedings and discussed a matter gone into and a ruling thereon outside the presence of the jury, neither the newspaper article or other evidence was presented in support of the motion for mistrial. Said motion was denied.

VI

SUMMARY OF ARGUMENT

Where motion for mistrial was denied because of no showing of the alleged damaging newspaper article nor any evidence presented in support of said motion, the denial of such motion pursuant to State law and the practice in State Courts will not support the Supreme Court's jurisdiction.

VII

ARGUMENT

Petitioner, a white disbarred attorney, sentenced to a fine of five hundred dollars and six months imprisonment for practicing law while disbarred seeks reversal of his conviction on the ground that he was denied due process, as guaranteed under the Fourteenth Amendment, when the trial judge denied a motion for mistrial based upon an allegation that a newspaper article created a prejudicial influence upon the jury.

There was no evidence that the alleged damaging newspaper article was produced or that there was any evidence presented in support of such motion.

Respondent contends that motion for mistrial was properly denied.

It has long been the practice in Alabama that the granting of a mistrial rests in the sound discretion of the trial judge. This rule was stated in *Hallman v State*, 36 Ala. App. 592, 61 So. 2d 857, Cert. Den. 258 Ala. 278, 61 So. 2d 861:

> "Title 30, Sec. 100, Code 1940, empowers the trial judge to declare a mistrial 'when in the opinion of the court or judge there is a manifest necessity for the discharge, or when the ends of justice would otherwise be defeated.'

> "Of necessity the right thus given must address itself to the sound discretion of the presiding judge."

In the case now before this Honorable Court there was no claim that any juror read the newspaper article. Had there been evidence presented such as introducing the newspaper article into evidence and also some evidence that it had been read by a juror, Alabama law would require the State to disprove any damage in view of the fact that the jury was not kept together at night.

The Federal Rule which petitioner seeks to have put into force appears more lax in its application. In *United States v. Rubino*, 431 F. 2d 284 (1970), Cert. Den. 91 S. Ct. 872, 401 U. S. 910, 27 L. Ed. 2d 808, rehearing denied 91 S. Ct. 1224, 401 U. S. 1004, 28 L. Ed. 2d 540, the United States Court of Appeals; Sixth Circuit, held that the trial judge has a large discretion in ruling on the issue of prejudice resulting from reading by jurors of news articles relating to the trial, saying:

> "In the present case, where it is not shown that the newspaper stories came through or from the prosecution, it is our opinion that the burden of establishing that he has been treated unfairly rests upon Rubino. Marshall v. United States, 355 F. 2d 999, 1007 (9th Cir.), Cert. Den. 385 U.S. 815, 87 S. Ct. 34, 17 L. Ed. 2d 54, rehearing denied 385 U.S. 964, 87 S. Ct. 388, 17 L. Ed. 2d 309. Rubino, in our opinion, has made no such showing in the record of the present case."

The granting or denial of a motion for mistrial rests in the sound discretion of the trial judge and this Honorable Court has held that the writ of certiorari may not be used to correct such exercise of discretion in the lower court in

the absence of an aggravated abuse of such discretion. Certainly none has been shown here. The petitioner has not asserted any ground for consideration of this writ under Rule 19. Petitioner was given a fair and legal trial and afforded due process of law. Respondent submits that no federal question is here presented and that this writ should be denied.

VIII

CONCLUSION

For the foregoing reasons, we submit that the denial of motion for mistrial made pursuant to State statute and practice is not such a ruling as will support the jurisdiction of this Honorable Court. There has been no violation of the Due Process Clause because of the ruling of the trial court in exercising its discretion. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

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IX

CERTIFICATE OF SERVICE

I, David W. Clark, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that I did serve the requisite copies of the foregoing Brief and Argument of Respondent on Attorney for Petitioner, by mailing said copies to him, postage prepaid, as follows:

TO: Honorable Fred Blanton, Jr.
Twenty-One Twenty-One Building
Suite 1627
Birmingham, Alabama 35203

MARCH 6, 1972.

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